Supreme Court of the United States,

OCTOBER TERM, 1905.

No. 15.

ORIGINAL.

COMMONWEALTH OF KENTUCKY, *Petitioner*,

vs.

ANDREW M J. COCHRAN, *Defendant*.

ON PETITION FOR WRIT OF MANDAMUS.

BRIEF FOR DEFENDANT.

STATEMENT.

At the August, 1900, term of the Circuit Court of Scott County, Kentucky, Caleb Powers was tried under an indictment charging him with being an accessory before the fact to the murder of William Goebel, and found guilty by the jury, and his punishment fixed at imprisonment for life. The Court of Appeals of Kentucky reversed the judgment rendered on

said verdict on March 28th, 1901, and remanded the case to the Scott Circuit Court for another trial. A second trial in said court resulted in another verdict of guilty and judgment thereon, which, on appeal to the Court of Appeals, was reversed on December 3d, 1902. A third trial in the Scott Circuit Court resulted in a third verdict of guilty, returned August 29th, 1903, which fixed his punishment at death, and the judgment thereon was reversed by the Court of Appeals on December 6th, 1904. The mandate of the Court of Appeals on its last judgment of reversal was filed in the Scott Circuit Court on May 3d, 1905, and the case was redocketed, and set for a fourth trial on July 10th, 1905. Immediately after the filing of said mandate in the Scott Circuit Court, Powers tendered to that court his petition, under *section 641, Revised Statutes of United States*, to remove the prosecution to the United States Circuit Court for the Eastern District of Kentucky. The Scott Circuit Court refused to allow the petition for removal to be filed. The next term of said United States Circuit Court began on May 8th, 1905, five days after the tender of the petition for removal to the state court. On that day a partial transcript of the record—all that the clerk was able to copy meanwhile—was filed in said United States Court, and the cause docketed therein, and leave given to Powers until June 8th thereafter to procure and file an additional transcript, which was done within the time allowed.

At the time the partial transcript was filed, the Commonwealth of Kentucky objected to the filing and to the docketing of the cause in the United States Court, and moved to set aside the order filing and docketing, which the court overruled. On the same day Powers moved the court for a writ of *habeas*

corpus cum causa, as provided by *section 642, Revised Statutes of United States.* This motion was sustained in an opinion delivered by Judge Cochran on July 7th, 1905, and Powers was taken from the custody of the state court and placed in the custody of said United States Court. On December 18th, 1905, the Commonwealth of Kentucky filed in this court its petition for a writ of mandamus directed to Hon. A. M. J. Cochran, Judge of the United States Circuit Court for the Eastern District of Kentucky, commanding him to remand said prosecution to the Circuit Court of Scott County, and to restore the body of Caleb Powers to the jailer of Scott County to abide the judgment and orders of the state court.

Section 641, Revised Statutes of United States, under which the removal proceedings were taken, provides as follows:

"When any civil suit or criminal prosecution is commenced in any state court, for any cause whatever, against any person who is denied or can not enforce in the judicial tribunals of the state, or in the part of the state where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, * * * such suit or prosecution may, upon the petition of such defendant filed in said state court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial in the next circuit court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the state courts shall cease, and shall not be resumed except as hereinafter provided."

The rights which Powers claimed in his petition for removal were denied and could not be enforced in the judicial tribunals of the state, were two:

1. A right to be released from custody by virtue of an executive pardon.

2. A right to be tried by a jury selected without discrimination against members of the political party to which he belongs, because of their being members of that party.

This brief will discuss the ground for removal, based on the second of these alleged rights.

The petition for removal, in connection with the record of the proceedings in the state court, shows these facts:

In all three of the trials in that court, the state officers who selected and summoned the veniremen from whom the twelve jurymen to try Powers were chosen, purposely excluded therefrom persons qualified for jury service, solely for the reason that they were members of the same political party to which Powers belonged, to-wit, the Republican party. They did this, not in a few instances only, but systematically and repeatedly, so that not a single Republican was a member of either one of the three juries that tried him.

The jurors from whom the first jury were chosen came from Scott County.

The jurors from whom the second jury were chosen came partially from Scott County and partially from Bourbon County, an adjoining county to Scott. That jury, as selected, was composed of six jurymen from each of these two counties.

The jurors from whom the third jury were chosen came from Bourbon County.

In this record the term "Goebel Democrat" often occurs. It means those who supported William Goebel for governor in the November election, 1899, when there were three candidates,—Goebel, Taylor and Brown,—the latter of whom ran as an Independent Democrat.

The first jurors were summoned by the sheriff of Scott County. He summoned 140 men, all of whom were "Goebel Democrats, except three or four Republicans and Independent Democrats."

The statute of Kentucky gives to the Commonwealth five peremptory challenges in a prosecution for felony, and to the defendant fifteen.

The second jury was chosen partly from a list of 200 names placed in a wheel, as provided by the Kentucky statutes, by three jury commissioners in October, 1900. At that time an appeal to the Court of Appeals of Kentucky was pending from the first judgment of conviction. Those three jury commissioners were all "Goebel Democrats." Of the 200 names put by them in the jury wheel, 195 were Goebel Democrats and five were Republicans. Of these 200 names, 75 were drawn out at the regular February and May, 1901, terms of said court, and the remaining 125 were drawn out at Powers' second trial in October, 1901. Of the five Republicans whose names were placed in the wheel, one was drawn out at the February term, and one at the May term, thus leaving three to be drawn out at Powers' trial. Of those three, two were disqualified by having previously formed their opinions as to his

guilt or innocence, and the remaining one was peremptorily excused by the Commonwealth. Six jurors were selected from said 125 names drawn from the wheel, and, in order to complete the panel, the sheriff was ordered to summon 100 men from Bourbon County, and afterwards to summon 75 more men from Bourbon County. Under these orders he summoned 168 men, from whom the balance of the jury that tried Powers was selected. Of those 168 men, 165 were Goebel Democrats and the other three were Republicans.

The third jury was selected from 176 men summoned by the sheriff, of whom 172 were Goebel Democrats and three were Republicans, and the other one was a man of doubtful politics, but a supporter of Goebel in his race for governor.

The average Democratic vote of Scott County at the last three Presidential elections was 2,378, and the average Republican vote 1,977.

The average Democratic vote of Bourbon County at the said elections was 2,402, and the average Republican vote 2,314. At the election for governor in November, 1899, Taylor, the Republican candidate, received 27 more votes than Goebel in Bourbon County.

The proportion of Democratic voters to Republican *white* voters in Scott County, is less than two to one; and in Bourbon County less than three to one.

The uncontradicted allegations of the petition for removal show that this exclusion of Republicans was not accidental, but was purposely done; and that it was not because they were illiterate, nor because they were not qualified for jury service,

but because they were Republicans, because they belonged to the same political party that Powers belonged to.

The sworn allegations of a petition for removal which are not traversed, must be taken as true, except in so far as they are contradicted by the record. *Dishon v. Ry. Co., 133 Fed., 471.*

That such conduct on the part of these state officials who selected and summoned the venires from whom the juries that tried Powers were selected, was a violation of his right to the equal protection of the laws, guaranteed to him by the fourteenth amendment to the Constitution of the United States, has not been questioned in argument.

This violation of the right of Powers to demand that the jury to try him should be selected without discrimination against those who belonged to the samé political party he did, was specially hurtful to him by reason of the fact that the crime with which he was charged grew out of a political controversy, to-wit, a contested election, which aroused great political feeling and animosities in the counties from which the juries that tried him came. No wiser words ever emanated from the bench than these of Judge Barker in his separate opinion on the last hearing of this case in the Court of Appeals of Kentucky (*26 Kentucky Law Reporter, 1111; 83 Southwestern Reporter, 149.*) He says:

"I do not insist that in ordinary criminal trials there is any necessity for watchfulness to keep politics out of the jury box. When ordinarily one is arraigned for crime, it is immaterial whether the jurors are of the same or an opposing political party. Usually this is a question which excites neither the interest of the accused nor that of his counsel. But when the

offense springs from an intense political contest, all becomes different. Then the political complexion of the jury is all important. The administration of even-handed justice has no more insidious enemy than political prejudice. It enters unseen and unsuspected into the human mind, corrodes the reason and undermines the judgment. Neither purity of heart nor exaltation of character affords an antidote for this deadly poison. Indeed, these virtues may well magnify the evil, for the mind thus possessed is all the more ready to enforce the oblique judgment when it has no cause to suspect its own integrity. The pages of history are eloquent with the evils of this passion."

This action of the sheriff and jury commissioners, in excluding Republicans from the juries that tried Powers because of their being Republicans, is not sufficient to entitle Powers to a removal of his case to the United States Court under *section 641, Revised Statutes of United States.* It is true that their action in so doing was the action of the state, and hence was in violation of Powers' right under the fourteenth amendment, to the equal protection of the laws. But *section 641* does not give a right of removal in every case where a man's right to the equal protection of the laws is violated by the state. It is only when that right is denied *in the judicial tribunals of the state*, or can not be enforced *in the judicial tribunals of the state*, that there is a right of removal. *Virginia v. Rives, 100 U. S., 313; Neal v. Delaware, 103 U. S., 370; Gibson v. Mississippi, 162 U. S., 565; Smith v. Mississippi, 162 U. S., 592; Murray v. Louisiana, 163 U. S., 101.*

This wrongful action by the subordinate officers who summoned the juries was made known to the Scott Circuit Court

by motions to discharge the venires and panel on the second and third trials, and that court decided that Powers had no right to demand that the juries empaneled to try him should be selected from men summoned without class discrimination, provided the men actually summoned possessed the qualifications prescribed by the statutes of Kentucky.

The Scott Circuit Court is the highest court in Kentucky that can decide that question. The Court of Appeals of Kentucky has jurisdiction of this prosecution, but no jurisdiction to reverse or overrule the decision of the Scott Circuit Court on that question.

ARGUMENT.

Section 641, Revised Statutes of United States, gives a right of removal in either one of two states of case:

1. Where a person is *denied* in the judicial tribunals of the state, any right secured to him by any law providing for the equal civil rights of citizens of the United States.

2. Where a person *can not enforce* in the judicial tribunals of the state any right so secured to him.

As said by Mr. Justice Bradley in the case of *Texas v. Gaines, Fed. Cas. No. 13847*, in speaking of the third section of the original Civil Rights Act, which is substantially identical in its wording with *section 641:*

"Here are two classes: (1) Persons who are *denied* any of the rights secured to them by the first section of the act; (2) Persons who *can not enforce* in the courts any of said rights."

The right which Powers asserted in the second paragraph of his petition is a right secured to him by "a law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States." The fourteenth amendment is such a law; and the right so asserted is a right secured by that clause of the amendment which provides that "no state shall * * * deny to any person within its jurisdiction the equal protection of the laws." *Strauder v. West Virginia, 100 U. S., 303.*

Judge Barker, in his separate opinion on the last hearing of this case in the Court of Appeals of Kentucky, thus tersely states the doctrine deduced from numerous decisions of this court:

"The Supreme Court of the United States, the final arbiter in all matters involving the federal constitution, has uniformly held that the exclusion from juries, grand or petit, of persons belonging to a class, for the sole reason that they belonged to such class, is, as to a member of the excluded class being tried under a charge of crime, a deprivation of the equal protection of the laws. This question has generally arisen in cases involving the exclusion and trial of negroes. This might well be expected in the confusion of adjusting the rights of this race from their former condition of slavery to that of citizens under the thirteenth, fourteenth and fifteenth amendments. But the application of the principle under discussion is not confined to the rights of negroes. It extends to every person—whatever his race, color or political affiliation—if his legal rights have been denied solely because thereof."

Section 1977, Revised Statutes of United States, which is section 16 of the Civil Rights Act of 1870, is also such a law.

It confers rights, not on colored persons only, but on "all persons within the jurisdiction of the United States." That such was the intention of Congress is shown by the preamble to the amendment thereto passed in 1875, which reads:

"Whereas it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in all its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color or persuasion, religious or political."

The two questions to be discussed are:

I. Was Caleb Powers, at the time of the filing of the petition for removal, *denied* in the judicial tribunals of the state the equal protection of the laws, within the meaning of section 641?

II. Was Caleb Powers, at the time of the filing of the petition for removal, *unable to enforce* in the judicial tribunals of the state his right to the equal protection of the laws, within the meaning of section 641?

I.

Section 641 does not speak of a "denial" by the state. It speaks of a denial "in the judicial tribunals of the state." The fourteenth amendment prohibits a denial of the equal protection of the laws by the state, and this prohibition applies to all the departments of the state,—legislative, executive and judicial. But the denial spoken of in section 641 is solely a *judicial* denial,—a denial "in the judicial tribunals."

A denial by executive or administrative officers of the state is not within its terms; nor is a *legislative* denial within its terms.

It is true that this court has decided in *Strauder v. West Virginia, 100 U. S., 303,* and other cases, that a legislative denial of his equal civil rights entitles a party to a removal under *section 641.* But it puts this, not upon the ground that a legislative denial is within the terms of that section, but upon the ground that *it is fair to presume* that this legislative denial will be followed by a denial in the *judicial tribunals.* As this court puts it in *Virginia v. Rives, 100 U. S., 313:*

"When a statute of a state denies his right, or interposes a bar to his enforcing it in the judicial tribunals, the presumption is fair that they will be controlled by it in their decisions."

As pointed out in the above cases and in the later cases that have followed them, it is not every denial "in the judicial tribunals of the state" of equal civil rights that entitles a party to a removal under that section. This is by reason of another clause in that section, which requires the petition for removal to be filed "before the trial or final hearing of the case." This excludes judicial action that takes place *after* the trial or final hearing has begun, even though that judicial action may amount to a denial of the equal protection of the laws.

The language in that section "at any time before the trial or final hearing of the case," refers to "the last and final hearing." *Ayers v. Watson, 113 U. S., 594; Insurance Co. v. Dunn, 19 Wall., 214; Baltimore & Ohio R. Co. v. Bates, 119 U. S., 464; Fisk v. Henarie, 142 U. S., 459.*

There is nothing in section 641 that excludes a denial "in the judicial tribunals of the state" from entitling a party to the benefit of a removal under that section. The only judicial denials that are excluded are those that take place after the "last and final hearing" has commenced.

Nor has this court ever decided that a denial "in the judicial tribunals of the state," which is made *before* the "last and final" trial has begun, does not come within the spirit as well as the letter of section 641, as is demonstrated by Judge Cochran in his opinion in this case.

It would be, I submit, an anomalous construction of a statute which speaks, not of a *legislative* denial, nor of an *executive* denial, but solely of a *judicial* denial,—a denial "in the *judicial* tribunals of the state,"—to say that it refers, not to a *judicial* denial, but solely to a *legislative* denial.

In *Virginia v. Rives*, *100 U. S.*, *313*, a removal was sought on the ground that the state court had denied to the petitioner his equal civil rights, but this court puts its decision that the removal was unauthorized, not upor the ground that the denial complained of was a judicial and not a legislative denial, but upon the ground that the denial complained of was not a denial of any right of the petitioner. It was simply a refusal by the court to provide him with a mixed jury, a thing he had no right to demand.

In *Neal v. Delaware*, *103 U. S.*, *370*, the ground for removal alleged was that negroes had always been excluded from juries in Delaware, and that this exclusion was by virtue of the constitution and laws of the state. There was a motion made to the court to quash the indictment, and the panels of the

grand and petit juries, for this reason, which the trial court overruled. But these motions, and this action of the court thereon, all took place after the petition for removal was filed, and were not, (and of course could not have been,) alleged as a ground for removal.

In *Gibson v. Mississippi*, *162 U. S.*, *565*, one of the grounds upon which a removal was sought was that the state officers who selected the grand jurors, who returned the indictment against the defendant, were prejudiced against him on account of his being a negro, and had discriminated against his race in selecting said grand jurors. It was held that this was not sufficient to entitle him to a removal under *section 641*. There was no claim made in the petition that the *state court had decided* that such discrimination was not a violation of his civil rights.

In *Smith v. Mississippi*, *162 U. S.*, *592*, there was a motion made in the state court to quash the indictment, which was overruled prior to the filing of the petition for removal. But this action of the court, in overruling the motion to quash, was not alleged as a ground for removal in the petition. Besides, this court held that the action of the state court, in overruling the motion to quash, was proper. It could not, therefore, amount to such a *denial* of his rights "in the judicial tribunals of the state" as would entitle him to a removal under *section 641*.

In *Murray v. Louisiana*, *163 U. S.*, *101*, there was a challenge to the grand jury which found the indictment against the defendant, on the ground that jury commissioners in selecting it had discriminated against the class to which he belonged.

The trial court did not deny the defendant's right to demand that the grand jury which found the indictment against him should be selected without class discrimination. On the contrary, that court expressly conceded such right. It put its judgment overruling the challenge upon the ground solely that the evidence showed that no discrimination had been practiced. It held "that while it was undeniable that the exclusion from the general service of all people of the African race on account of their color would be an unlawful abridgement of the rights of such citizens, yet that the evidence did not disclose such a case, but showed that the general service was not exclusively made up of the names of white persons, and that it was clearly established that colored people were not excluded on account of their race or color."

This action of the court was not alleged as a ground for the removal sought. Besides, it manifestly furnished no ground for a removal, for it was not a denial of his right to a jury selected without class discrimination.

In *Williams v. Mississippi*, *170 U. S.*, *213*, there was a motion to quash the indictment, which was overruled prior to the filing of the petition for removal. It does not appear from the report that this action of the trial court was alleged as a ground for the removal sought. Anyhow, the action of the trial court in overruling the motion to quash, was adjudged by this court to be proper. It, therefore, did not deny to the petitioner the equal protection of the laws, and hence, of course, furnished no ground for removal under *section 641*.

In none of these cases did this court decide that a *judicial* denial of his equal civil rights would not entitle a party to a removal under *section 641*.

The clause in section 641, "or in the part of the state where the suit or prosecution is pending," strongly indicates that the denial spoken of was not meant to refer to a legislative denial only. True, it is possible that an act of a state legislature denying equal civil rights might be made, by its terms, to apply to one section of a state and not to another. But such legislation would be unusual. On the other hand, it might often occur that a court in one section of the state would deny such rights, whereas the courts in other sections of the state would not.

What sort of a judicial denial then is embraced by section 641?

On principle, any judicial denial which takes place *before* "the last and final hearing" has begun, which *it is fair to presume* the court will adhere to, or follow, on "the last and final hearing," comes within the very letter of section 641.

A *legislative* denial is embraced by section 641, not because it is a *legislative* denial, for that section speaks only of a denial "in the judicial tribunals," but because it is fair to presume that the judicial tribunals will be controlled by it, not because they are actually bound to follow it, but because the *presumption is fair* that they will.

When an act of the legislature denies a right guaranteed by the fourteenth amendment, a person whose rights are thus denied can never say, with certainty, in advance of his trial, that his rights are denied "in the judicial tribunals of the state." For, it may be, the judicial tribunal will do its duty and declare the legislative enactment void. But inasmuch as the "presumption is fair" that the tribunal will not do that,

a party is entitled to a removal under a statute which gives that right where his rights *are* denied in the judicial tribunals of the state.

In case the Scott Circuit Court had in his former trials denied to Powers the equal protection of the laws, or, in other words, had denied his right to be tried by a jury selected without discrimination against the class to which he belonged, and this ruling of the Scott Circuit Court had been approved by the Kentucky Court of Appeals, undoubtedly that would have presented a typical case where he would be entitled to a removal under section 641, on the ground that his right to the equal protection of the laws was denied "in the judicial tribunals of the state."

Or if, in some other case, the Court of Appeals of Kentucky had decided that a defendant in a prosecution for a felony had no right to demand that the jury empaneled to try him should be chosen from men selected and summoned without discrimination against the class to which he belonged, that would have presented a typical case for removal under section 641. There would have been a denial in the highest judicial tribunal of the state, which would presumably have been followed by all the trial courts of the state.

The Scott Circuit Court has decided, in this prosecution, that Caleb Powers has no right to demand that the jury empaneled to try him shall be selected and summoned without discrimination against the class to which he belongs; that his sole right was to have jurors who possessed the qualifications prescribed by

the statutes of Kentucky. The Scott Circuit Court is the highest court in Kentucky that has jurisdiction to decide that question.

This record shows that Powers' right to be tried by a jury impartially selected was denied him by the sheriff and jury commissioners who selected and summoned the venires for his three trials; and also that on his second and third trials this fact was shown *to the court* by affidavits filed therein, and motions made to discharge the venires and the panel for that reason; and that the *court* overruled all these motions.

It further shows that on the third trial Powers moved the court before any veniremen were summoned, to instruct the sheriff to summon persons possessing the statutory qualifications without regard to their political affiliations. This motion the court overruled.

It further shows that on Powers' motion to discharge the first venire from Bourbon County, which was accompanied with affidavits showing that the discrimination complained of had been practiced by the sheriff and his assistants in summoning the jury, and specifically just how it had been practiced, (pp. 177 to 183 printed record,) the court overruled his motion by an order in the following words (p. 177 printed record):

"Thereupon the court overruled the motion without any reference to said affidavits and the court holds that it is not claimed in the grounds of said motion that said jurors are not sensible, discreet and sober men, and housekeepers of Bourbon County over the age of twenty-one years."

The affidavits, thus excluded from consideration by the Scott Circuit Court, showed that by a pre-arranged system of exclusion and elimination, the sheriff and the persons from Bourbon County whom he had called in to assist him, purposely passed by and refused to summon men well qualified for jury service because they were Republicans or Independent Democrats, and summoned Goebel Democrats in the same neighborhood; and the result of their work was that of the 95 men summoned on that venire, 93 were Goebel Democrats and two were Republicans.

The second venire which was summoned after the court had made this decision, refusing to discharge the first venire, was composed of 81 men, 80 of whom were Goebel Democrats, and one was a Republican.

The motions to discharge the second venire and the panel were overruled without the order reciting the grounds upon which the court did so. The fair presumption is that it was upon the same ground that the motion to discharge the first venire was overruled. That ground was that inasmuch as it was not claimed that the veniremen did not possess the qualifications required by the Kentucky statute, it was not material that in their selection Republicans had been excluded solely for the reason that they were Republicans.

In other words, the Scott Circuit Court decided, as is shown on the face of the order, that Powers had no right to complain of the manner by which that jury was thus packed, inasmuch as he did not claim that they did not have the qualifications prescribed by the Kentucky statute, and that he was

not entitled to a jury selected without discrimination against the class to which he belonged.

As said by Judge Barker in his separate opinion in this case on the last hearing thereof in the Kentucky Court of Appeals:

"It is clear that the trial judge was of opinion that it was not an offense against the fourteenth amendment or a denial of the equal protection of the laws to the defendant, to exclude Republicans from the jury solely because they were Republicans, provided the selected Democrats were possessed of the statutory qualifications required for jury service. There was no decision on the evidence offered as to whether or not, in fact, there had been the discrimination complained of, it being necessarily assumed that this was, if true, an immaterial circumstance."

This was not a decision that Powers' right, under the fourteenth amendment, to a jury selected without class discrimination, had not been violated by the sheriff and his assistants. It was a decision that he had no such right. It was a denial of the existence of the right, not an admission of its existence and a denial of its violation.

In the brief of counsel for petitioner, it is not contended that this is not the proper construction of that decision. Their contention is, in effect, that the evidence offered was not sufficient to prove the violation of the right claimed, because the witnesses did not state their means of knowledge.

The Scott Circuit Court did not so decide. It decided that evidence of the *violation* was immaterial, inasmuch as the *right* did not exist.

The Scott Circuit Court is the highest court in Kentucky that has jurisdiction to pass upon Powers' right to be tried by a jury selected without discrimination against the class to which he belongs.

The Court of Appeals of Kentucky has jurisdiction of the prosecution against Powers by virtue of *section 334, Criminal Code of Kentucky*, which reads:

"The Court of Appeals shall have appellate jurisdiction in prosecution for felonies, subject to the restrictions contained in this article."

Section 281 of the *Criminal Code* provides as follows:

"The decisions of the court upon challenges to the panel, and for cause, upon motions to set aside an indictment and upon motions for a new trial, shall not be subject to exception."

The Court of Appeals in numerous cases, amongst others in this identical prosecution, has held that it has no jurisdiction, by reason of this section 281, to reverse for any error of the trial court in the selection and empaneling of a jury. *Powers v. Commonwealth, 114 Ky., 237; Turner v. Commonwealth, 80 S. W. Rep., 197; Howard v. Commonwealth, 80 S. W. Rep., 211; Hathaway v. Commonwealth, 82 S. W. Rep., 400.*

The sharp question now presented is: Is the decision of of the Scott Circuit Court, (the highest court in the state that can decide the question,) that Powers has no right to demand that the jury that tries him shall be selected without discrimination against the class to which he belongs, such a denial of his rights "in the judicial tribunals of the state" as entitles him to a removal under section 641?

It will be observed that the "denial" spoken of by section 641 is not a *future* denial, but a *present* denial. "*Is* denied" not "will be denied," is the language of that section.

In no other way could there be, at the time of the filing of a petition for removal, an *actual, then present* denial "in the judicial tribunals of the state," of the equal protection of the laws, except where some judicial tribunal of the state had theretofore decided that a party is not entitled to some right which is guaranteed to him by that clause of the fourteenth amendment, and that decision was rendered by such a court that the presumption would be fair that it would be adhered to, or followed, by the court in which the action sought to be removed was pending. For example, if the Court of Appeals of Kentucky had jurisdiction to decide, and had decided, that a party being tried for a felony had no right to demand that the jury to try him should be selected and summoned without discrimination against the class to which he belonged, that would have been, as long as that decision was not overruled by the Court of Appeals or reversed by this court, an actual present denial, in the judicial tribunals of the state, of the equal protection of the laws.

This court, in *Strauder v. West Virginia, 100 U. S., 303*, has construed section 641 to embrace, not only an *actual* judicial denial, but a *presumptive* judicial denial, a denial, not in a judicial tribunal at all, but by legislative enactment which it is *fair to presume* will be hereafter followed in the judicial tribunals.

A denial by a sheriff or jury commissioners will not raise such a presumption, for courts do not usually follow the opin-

ions of mere ministerial officers in deciding questions of law. The reason why a legislative denial will raise such a presumption, is that courts act upon the presumption that the legislature has duly considered the constitutionality of every law it enacts, and its opinion is entitled to some weight in the courts.

Courts usually follow their former decisions. Particularly is that true when the court is the highest court in the state that has jurisdiction to decide the question. Hence such former decision raises a fair presumption that it will be followed by the court that rendered it.

A court is not absolutely bound to adhere to any of its former decisions. No more is a court bound by a state statute which violates the fourteenth amendment to the federal constitution. In fact, it is the duty of a court to disregard an unconstitutional statute; and it is the duty of all courts to disregard their former decisions when they are convinced they are wrong. But inasmuch as there was a fair presumption that the courts of West Virginia would not disregard an unconstitutional statute, which deprived a defendant of his right to a jury selected without class discrimination, this court held, in *Strauder v. West Virginia*, *supra*, that he was entitled to a removal under section 641. So, when the Scott Circuit Court has deliberately decided on several occasions, and whenever the question has been presented to it, that Powers had no right to demand that the jury to try him shall be selected without class discrimination, and has put that decision, with its grounds therefor, upon its record, and that decision has never been reversed or overruled, the presumption is fair that the same court will adhere to that decision in any subsequent trials of the same case.

Even if such a decision had been made by that court in a different case, the presumption is fair that it would have been adhered to in this case. In so adhering to its former ruling, the court would simply have been applying the doctrine of *stare decisis*. That doctrine applies not to decisions of courts of last resort only. It applies to all courts.

Chancellor Kent, in *Vol. 1* of his *Commentaries*, page 475, says:

"A solemn decision upon a point of law, arising in any given case, becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the judgment, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case. If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness. * * * When a rule has been once deliberately adopted and declared, it ought not to be disturbed, unless by a court of appeal or review, and *never by the same court*, except for very cogent reasons, and upon a clear manifestation of error."

See also *Hadden v. Natchang Silk Co., 84 Fed., 80; Wakelee v. Davis, 44 Fed., 532; Oglesby v. Attrill, 14 Fed., 214; in re Hale, 139 Fed., 496.*

It is plain that the learned chancellor, in this extract, was not speaking of the decisions of courts of last resort only, for he speaks of decisions which *may be reversed* by a higher court, and he says those decisions should be adhered to until reversed.

Caleb Powers has thus been denied the right to be tried by a jury selected without class discrimination by the Scott

Circuit Court, the only court of the state that had any power to enforce that right. The decision of that court to the effect that he had no such right as he claimed, has never been reversed. The fair presumption is that that court will not reverse its own ruling in a future trial of the same case. Therefore, Caleb Powers can say, in advance of his next trial, that he is denied "in the judicial tribunals of the state" the equal protection of the laws, with just as much ground for so doing as if there had been an unconstitutional statute of the state, which denied to him the equal protection of the laws. The presumption that a court will follow its own previous decision as long as it remains unreversed, is, at least, as strong as the presumption that it will give effect to an unconstitutional statute. The former presumption is really the stronger of the two. It rests upon the legal doctrine of *stare decisis*, whereas there is no presumption that a court will give effect to an unconstitutional statute, except such as is based on the presumption that the legislature believed it to be constitutional. The opinions of a legislature as to the constitutionality of a law certainly do not carry as much weight "in the judicial tribunals of the state" as do prior decisions of the same court, particularly when that court is the highest court in the state that has jurisdiction to pass upon the question decided.

The case presented is the same, in principle, that would have been presented, if Caleb Powers had never been tried at all, but some of the other defendants, jointly indicted with him for the murder of Goebel, had been tried in the Scott Circuit Court, and on their trials that court had decided that they did not have the right to demand that the juries empaneled to try them should be chosen from men summoned without discrimi-

nating against Republicans, because of their being Republicans. Such a decision, it is fair to presume, would have been adhered to by that court on the trial of Caleb Powers. Hence Powers could say, before his trial began, that the Scott Circuit Court *denies*, (in the present tense,) the right, which the constitution of the United States gives to him, to require that the jury to try him shall be selected from men summoned without discrimination against Republicans, on account of their being Republicans.

The circumstance that such decision was made in a former trial of Powers, instead of in a trial of some one else jointly indicted with him, does not change the principle. It only presents a stronger case for its application.

It is argued by counsel for petitioner that *it may be*, if another trial is had in the state court, the sheriff and jury commissioners *may not* discriminate against Republicans in selecting the jury. But Powers is not bound to rely for the protection of his rights under the federal constitution, on the honesty and fairness of a sheriff and jury commissioners. He is entitled to have those rights acknowledged and enforced by the *courts* of the *state*. If they are not acknowledged, but denied, by the courts, or if the courts are unable to enforce them when violated by a sheriff or jury commissioners, he is entitled, by the express terms of *section 641*, to a removal to a court that *will* acknowledge and *can* enforce them.

Dishonesty and unfairness on the part of ministerial officers whose duty it is to select and summon jurymen, will not give a party a right to remove his case to the federal court under *section 641*, as was decided in *Virginia v. Rives*, *100*

U. S., 313. And their fairness and honesty can not take away his right of removal under that section, when the court denies his right to demand that the jury empaneled to try his case shall be selected without discrimination against the class to which he belongs. The intent of Congress in enacting *section 641* evidently was to give to everybody a right to have his case tried *in a court* which recognized his right to the equal protection of the laws. Where the state does not provide him such a court, it can not deprive him of his right of removal under *section 641*, by providing him honest and impartial sheriffs and jury commissioners *in lieu* of such a court. Still less could the mere possibility that those officers might hereafter act honestly and impartially, though they had not done so in the past, take away his right to a trial in a court which would recognize and could enforce the rights given to him by the Constitution of the United States.

Counsel for petitioner in his brief criticises the petition for removal on the ground that it fails to allege, in terms, that the sheriff of Scott County will, in a future trial of Powers, discriminate against Republicans in selecting and summoning the jury. Such an allegation would have been valueless; for in the nature of things, nobody can know with certainty what the sheriff will do in the future. All the facts that can possibly be alleged, are facts that have already transpired and conditions that now exist. We can judge the future by the past and present only. Besides, it should be borne in mind that the Scott Circuit Court has already decided that the sheriff and jury commissioners did no wrong in excluding Republicans from the venire solely because they were Republicans, so long as they

selected jurymen who were sober, discreet and sensible housekeepers of the county over twenty-one years old.

It is further argued that a right to an impartial jury is not a right guaranteed by the federal constitution. I submit that the case cited, *Brooks v. Missouri, 124 U. S., 394*, does not so decide. Anyhow, a right to have the jury which the state empanels to try him selected without discrimination against the class to which the defendant belongs, *is* a right guaranteed by the federal constitution, as was decided in *Strauder v. West Virginia, supra*, and many later cases.

II.

The question yet remains:

Is Caleb Powers entitled to a removal of his case on the ground that he can not enforce, in the judicial tribunals of the state, his right to be tried by a jury selected without discrimination against the class to which he belongs?

The Court of Appeals of Kentucky has jurisdiction of the prosecution against him by virtue of *section 334 of the Criminal Code*, above quoted. He can not enforce in that tribunal that right, by reason of the fact that a state statute, to-wit, *section 281 of the Criminal Code*, takes from that court the right to reverse a judgment of the trial court for erroneously and wrongfully denying him that right.

The "judicial tribunals of the state" referred to in *section 641*, are evidently those judicial tribunals which have jurisdic-

tion of the action or prosecution sought to be removed. No valid reason can be given why those words should be limited in their meaning to courts which have original jurisdiction of the action or proceeding. The language of the section contains no such limitation, and no reason is perceived why such limitation should be put in by construction.

On the contrary there is a powerful reason why the words "judicial tribunals of the state," in *section 641*, should *not* be restricted in meaning to trial courts. The judgment of a trial court of a state can not be "re-examined and reversed or affirmed" by this court, unless that trial court is "the highest court of the state in which a decision in the suit" can be had. (*Section 709, Revised Statutes of United States.*) The Court of Appeals is the highest court in Kentucky in which a decision in the prosecution against Caleb Powers can be had. It is the judgment of that court only in the case, therefore, that may be "re-examined" by this court. The judgment of the Scott Circuit Court can not be so re-examined. (*Great Western Tel. Co. v. Burnham, 162 U. S., 342.*) It results therefore that the error of the Scott Circuit Court in denying to Powers the right to be tried by a jury selected without class discrimination,—a right which is given him by the constitution and laws of the United States,—can not be corrected, on appeal or writ of error, by any court; not by the Court of Appeals of Kentucky, because of *section 281* of the Criminal Code, and not by this court, because it can re-examine the judgment of the Court of Appeals only, which is the highest court in the state in which a decision in the suit can be had; and the Court of Appeals has never decided that Powers was not entitled to be tried by a jury selected

without class discrimination, but only that it had no jurisdiction to pass upon that question.

This court can not reverse a judgment of the Court of Appeals, because it correctly decided that it had no jurisdiction to pass on certain alleged errors committed by the trial court.

In *Fashnacht v. Frank*, *23 Wall.*, *416*, this court said:

"We act only upon the judgment of the Supreme Court. Only such questions as either have been or ought to have been passed upon by that court in the regular course of its proceedings can be considered by us upon error."

Unless, therefore, the words, "judicial tribunals of the state," can be construed to embrace all the courts of the state which have jurisdiction of the case sought to be removed, then it would result that a right given to Caleb Powers by the Constitution of the United States, can be violated by the state, and can not be enforced by him in any court of the United States; not in this court on appeal or writ of error, because the judgment so violating his right was not made by the highest court in the state in which a decision in the suit could be had; not in the Circuit Courts of the United States, because that violation by the trial courts gave him no right to have his case removed to a federal court under *section 641*.

The evident object that Congress had in view in inserting this clause, "can not be enforced in the judicial tribunals of the state," in *section 641*, was to provide for cases where the state statutes deprived the state courts of jurisdiction to enforce some right given by the Civil Rights Act, or the equal protection of the laws clause of the fourteenth amendment. In cases

where the state courts did have jurisdiction to enforce such right, their failure to do so could be corrected by this court on appeal or writ of error, pursuant to *section 709, Revised Statutes of United States.* But if the trial court of the state was not given jurisdiction to enforce such right, that could not be corrected in the appellate court of the state, nor by this court on appeal or writ of error. For this court can not reverse a judgment of a state court for correctly deciding that it had no jurisdiction of a certain question. So also, if the trial court was given jurisdiction to enforce such right but the appellate court was not, though it had jurisdiction of the suit in which the right was claimed, this court could not reach, by appeal or writ of error, the error of the trial court in refusing to enforce such right. For it could only re-examine and reverse or affirm the judgment of the highest court of the state in which a decision in the suit can be had. It would result, therefore, in such a case, that the error of the trial court in refusing to enforce such right could not be corrected at all by any court, on appeal or writ of error. Congress evidently intended, therefore, that when this inability to enforce existed in the state court, whose judgment alone could be re-examined by this court, then a right of removal should be had; for otherwise a right under the federal constitution might be violated by the trial court of a state, and there would be no power in any federal court to enforce such right.

It has been argued that inasmuch as *section 281* of the Kentucky Criminal Code applies to everybody alike, it does not discriminate against Powers, and therefore it does not violate any of his rights under the United States Constitution. I

concede this. His rights are not *denied* by *section 281*. If they were, that code provision would be invalid. But the point is that his rights were denied by the State of Kentucky, acting by its subordinate officers who summoned the juries that tried him, and by the Scott Circuit Court, and *section 281* makes it impossible for him to *enforce* those rights in the Court of Appeals, although it had jurisdiction of his case. *Section 641* does not give a right of removal to those alone whose rights are *denied* by some law of the state, but also to those whose rights *can not be enforced* in the judicial tribunals by reason of some law of the state. If that law which thus forbids the enforcement of such rights is a valid law, it is a much more serious obstacle in the way of a party enforcing his rights than if it were an invalid law. The State of Kentucky had the right to give to the Court of Appeals jurisdiction of this prosecution, and to debar it from reviewing the action of the trial court in empaneling the jury. It had the right also, if it had chosen to do so, to take away from the trial court the right to question the action of the sheriff and jury commissioners; but had it done so, most certainly a case would be presented where a defendant would be entitled to a removal under *section 641*, on the ground that the statutes of the state interposed a bar to his being able to *enforce* his right to the equal protection of the laws, "in the judicial tribunals of the state." And yet, even in such a case it might be argued, with as much force as in the present case, that hereafter the sheriff and jury commissioners might act fairly and honestly in selecting and summoning jurymen.

It has been argued that if a right of removal exists in this case because of *section 281* of the Kentucky Code, every prose-

cution for a felony in Kentucky could be removed to the federal courts. If that were true, the evil could be easily remedied by a repeal of that section, or by a repeal of *section 334*, which gives to the Court of Appeals jurisdiction in prosecutions for felonies. A state cannot by one statute give one of its courts jurisdiction of a case, and by another statute deprive it of the power to enforce rights which are given to a party thereto by the Constitution of the United States, and then complain that a law of Congress gave that party a right to have his case tried in a court of the United States.

But the conclusion drawn by that argument does not necessarily follow. It may be that a party seeking to remove a case under *section 641*, on the ground of his inability to enforce his equal civil rights in the state courts, must show that some of the rights intended to be enforced by that section have been violated by the state, or such a state of facts as raises a fair presumption that they will be violated by the state.

Whatever may be the law as to that, the case of Caleb Powers is clear of any difficulty on that score. His right to be tried by a jury selected without class discrimination has been denied by the sheriff and jury commissioners of Scott County and by the Scott Circuit Court, and he *can not enforce* that right in the Court of Appeals. Whether an inability to enforce such a right in the Court of Appeals, in case it had never been denied, would have entitled him to a removal under *section 641*, does not arise in the present case.

If, in this case, the Court of Appeals of Kentucky had held that it had jurisdiction to pass upon the action of the Scott Cir-

cuit Court in deciding that Powers was not entitled to be tried by a jury selected without class discrimination, and had agreed with the Scott Circuit Court on that question, though reversing the judgment on other grounds, it would have presented a clear case within the very letter of *section 641*, where Powers could have alleged, in advance of a future trial, that he is *denied* "in the judicial tribunals of the state," the equal protection of the laws.

If a statute of Kentucky had provided that neither the trial court nor the Court of Appeals should have any right to set aside a venire summoned by a sheriff or jury commissioners, for the reason that in their selection those officers had purposely excluded all persons belonging to the same party to which Powers belonged, a clear case for removal would be presented under *section 641*, on the ground that he *could not enforce* "in the judicial tribunals of the state" his right to the equal protection of the laws.

The case at bar is one where Powers is *denied* the equal protection of the laws in one court, and a statute of the state interposes a bar to his *enforcing* his right to the equal protection of the laws in the other court.

Is such a case any less within the spirit and the letter of *section 641* than are the two supposed cases?

If it be conceded that the words in *section 641*, "in the judicial tribunals of the state," mean "in every one of the judicial tribunals of the state which have jurisdiction of the suit sought to be removed," still this case comes within the very terms of that section. For the terms of that section would

embrace a case where the *denial* was in one court and the *inability to enforce* was in the other, and those two were the only courts in the state which had jurisdiction of the suit.

It is respectfully submitted that the petition for mandamus against Judge Cochran should be denied.

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